In my humble opinion this appeal should be allowed, the order of the learned trial Judge should be reversed, the matter should be taken before the Registrar to tax the bill of the appellants as between solicitor and client. As a result of that taxation, the Court will be in a position to make any order which is necessary.

As I understand from counsel that this matter has been brought to this Court of Appeal only on a question of principle, and the (appellants) solicitors have given an assurance that they will in no circumstances take any action in this matter arising out of any order by this Court, there will, therefore, be no consequential order made.

The appeal is accordingly allowed and order made that the deposit in Court be paid out to the appellants.

Mudie and McFall, JJ. concurred in this judgment.

[ORIGINAL CIVIL JURISDICTION]

IN THE MATTER OF THE ESTATE OF HAJI TAMBY BIN HAJI MOHAMED SALEH DECEASED

HAJI ABDUL LATEEF BIN HAJI TAMBY AND ANOTHER.

v.

HAJI TAIB BIN HAJI ASHIM EXECUTOR OF THE WILL OF HAJI MAKADOM BINTE HAJI TAMBY DECEASED AND OTHERS.

[SINGAPORE ORIGINATING SUMMONS No. 72 of 1931]

Will—construction—"heirs as ascertained according to Mohammedan Law" surplus income derived from residuary contingent gift.

A Muhammadan testator devised and bequeathed "all my real and personal estate and effects movable and immovable either in Malacca or Singapore the Federated Malay States or elsewhere not already specifically devised unto my trustees or trustee upon trust to pay out of the income of the said estate my debts funeral and testamentary expenses legacies and annuities bequeathed free of duty and after 21 years from my death to sell call in and convert the same into money and the money so realised to divide among my heirs as then ascertained according to Mohammedan law."

Held, that the words "heirs as then ascertained according to Mohammedan law" mean those persons who would be the testator's heirs according to the Mohammedan law if he had died at the expiratino of 21 years from the actual date of his death.

Held further, that the gift at the expiration of the period of 21 years of the residue, carried with it surplus income arising out of the residue during such period and not exhausted by the trusts declared in respect of such income.

This was an originating summons for the construction of the Will of the abovenamed deceased which came on for hearing before Terrell, J.

Goho for the Plaintiffs.
Koek for the 1st Defendant.
Cobbett for the 2nd Defendant.
Roland Braddell for the 3rd Defendant.

Cur. Ad. Vult.

11-9-31.

TERRELL, J.—This was an originating summons for construction of the Will of Haji Tamby bin Haji Mohammed Saleh deceased. It was agreed between counsel that the matters arising for decision were the following:—

(1) Whether under clause 10 of the Will the corpus of the estate after the expiration of a period of 21 years was divisible among the testator's heirs living at his death and their representatives now living, or whether such corpus is divisible among an artificial class of persons who would have been the testator's heirs if he had died at the expiration of the period of 21 years.

(2) Whether the surplus income under clause 8 of the Will was validly disposed of.

Clause 10 of the Will reads as follows:—

"I devise and bequeath all my real and personal estate and effects movable and immovable either in Malacca or Singapore the Federated Malay States or elsewhere not already specifically devised unto my trustees or trustee upon trust to pay out of the income of the said estate my debts funeral and testamentary expenses legacies and annuities and duties payable on the legacies and annuities bequeathed free of duty and after 21 years from my

death to sell call in and convert the same into money and the money so realised to divide among my heirs as then ascertained according to Mohammedan law."

The first question for decision entirely depends upon the construction put upon the words "my heirs as then ascertained according to Mohammedan law."

A considerable number of authorities were cited and they were useful as showing the principles upon which the Courts decide a question of this kind. The first principle to be deduced is that *prima facie* the words "next of kin according to the Statute" have been held to mean a testator's next of kin at his death, and I have no doubt that the words "heirs according to Mohammedan law" mean *prima facie* the testator's heirs as at his death. This principle is however subject to a consideration of the actual words of the Will. As Lord Finlay said in the case of *Hutchinson* v. *National Refugees for Homeless and Destitute Children*, 1920 A.C. page 794 at page 802, "The question in this as in every other case of the kind must be whether there is in the Will a sufficient indication that the period of distribution is the time at which the class is to be ascertained" and later, "It is a question of construction in each case whether the class is to be ascertained at the death of the testator or at a later date. It is for those who assert that the class is to be ascertained at a date other than that of the death of the testator to show that this is the fair result of the language of the Will. If by the use of an adverb of time or otherwise the Will shows that the class is to be ascertained on the death of the holder of some antecedent interest this settles the point."

It is not necessary to consider all the various authorities which were cited, firstly because it is the duty of the Court to construe the words appearing in the Will and not to speculate upon what the testator might or might not have intended (*Scale* v. *Rawlins*, 1892 A.C. pages 342, 344). Secondly because expressions in quite another Will are by no means a safe guide for construing the words in the Will before the Court and thirdly because all the authorities in the slightest degree relevant were fully considered in the case of *Hutchinson* v. *National Refugees for Homeless and Destitute Children*, 1920 A.C. page 794 already referred to.

Reliance was placed on the case of *Mortimore* v. *Mortimore*, 4 A.C. page 448, where the words were "such person or persons as will then be entitled to receive the same as my next of kin under the Statute of Distributions." It was urged that these words in their essential meaning are indistinguishable from the words "among my heirs as then ascertained according to Mohammedan law."

Now to begin with it is quite clear that in the latter case the word "then" is an adverb of time while in Mortimore's case "then" may only mean on the failure of the preceding trust. But in any case, as Lord Cave explains at page 808 of *Hutchinson's* case, the word "then" in *Mortimore's* case referred to the time when the next of kin were to be entitled in possession not to the time when the class was to be ascertained. The *ratio decidenai* in the case of *Bullock* v. *Downes*, 9 H.L.C. page 1, was the same.

In *Hutchinson's* case as in the case now before the Court, the elements which determined the decisions in the above mentioned two cases are missing. The gift in *Hutchinson's* case was not to those persons entitled under the Statute who at the date of distribution might be entitled to receive the fund, but to those persons who on the failure of the preceding trust; that is to say, at the time of distribution, should be the testator's next of kin. So in the present case the gift is not to the testator's heirs according to Mohammedan law who might be entitled to receive the fund at the expiration of the period of 21 years but to those persons who might be the testator's heirs according to Mohammedan law at the expiration of the period of 21 years. That is to say, the gift is to an artificial class to be ascertained by assuming that the testator died at the expiration of the period. No other meaning in my opinion can be attached to the words "heirs as then ascertained." It would do violence to the express terms of the Will to read these words as if they were "my heirs according to Mohammedan law who will then become entitled."

As regards the second point, the principle is laid down in *Underhill & Strahan*, 3rd Ed. at page 247, that a blended residuary contingent gift

of both real and personal estate *prima facie* includes the intermediate income of both. This general rule may also be rebutted by other parts of the Will. The case of *In re Townsend*, 34 Ch. D. page 357, which was relied on as showing that there was an intestacy of the surplus income under clause 8, was a case where from the words of the Will it was obvious that the testator did not mean the remaindermen to enjoy the intermediate income. In the Will now before the Court no such intention can be found, and further than this the concluding words of clause 8 which require the trustees to invest the surplus income in the purchase of landed property indicate that the testator had not lost sight of the surplus income and intended that it should follow the destination of the corpus of the estate.

There will accordingly be a declaration that under clause 10 of the Will the persons who will be entitled to the corpus of the estate after the expiration of the period of 21 years will be the persons who would have been the testator's heirs according to Mohammedan law if he had died at the expiration of the period of 21 years. The corpus to be divided will include the accumulations of surplus income or the investments representing such accumulations. The costs of all parties will be taxed as between solicitor and client and paid out of the residuary Estate.

Order accordingly.

Solicitor for the Plaintiffs—*S. C. Goho.*
Solicitors for the 1st Defendant—*Chan & Eber.*
Solicitors for the 2nd Defendant—
Rodyk & Davidson.
Solicitors for the 3rd Defendant—
Braddell Brothers.

[APPELLATE CIVIL JURISDICTION]

TAN HO CHER TRADING etc.

v.

YEO POH, ALIAS NEO POH, etc.

[JOHORE CIVIL SUIT No. 95 OF 1930]
[JOHORE APPEAL No. 3 OF 1931]

Land—Agreement for sale—part performance—bona fide *purchaser for value—rights under Surat Sementara—fraud—doctrine of "Caveat Emptor."*

A. bought or purported to acquire C's. rights in a certain land, comprised in a Surat Sementara, without notice that before the transfer of such rights C. had already entered into a contract for sale of the land to B who had paid a part of the purchase price. At the time of purchase A. was aware that B. had been in occupation of 6 houses on the land but did not choose to enquire as to what were the rights and interests of B.

Held, that neither A. nor B. had a title under the Land Enactment to the land in dispute, for the reason that a person who occupies State land in Johore under a Surat Sumentara has no registrable interest in the land nor has he an indefeasible title within the meaning of the Land Enactment.

Held further, that the fact that A. had the means of discovering the truth by making enquiries as to B's. rights disentitled him to any relief.

Semble, if A. had completed his title to the land and tendered a proper conveyance to B., he might have as an assignee of C., a good claim against B. for recovery of the balance of the purchase price.

The Plaintiff in this case was the purchaser of a piece of land covered by Surat Sementara No. 267/25 from one Tan Juan. The said Tan Juan was originally occupier of the said piece of land on a permit from the Government of Johore. While in such occupation he agreed to sell it to the defendant, received practically the whole of the purchase price and put the defendant into possession of the land. The defendant built certain houses and remained in occupation. During the period of the defendant's occupation the said Tan Juan got a Surat Sementara for the land agreed to be sold to the defendant issued to him by the Government of Johore and thereafter, without the knowledge of the defendant, sold it to the plaintiff. The plaintiff brought the present case against the defendant to recover possession of the land covered by Surat Sementara No. 267/25 of Kukub and for damages for wrongfully holding possession. The defendant pleaded *inter alia* that he had entered into an agreement of purchase on 1st December 1925 prior to the issue of the Surat Sementara with Tan Juan from whom the plaintiff derived his title and that he had been in occupation for several years and built houses thereon. The defendant stated further that the plaintiff had had full knowledge of the fact and must be held in equity a trustee on behalf of the defendant of all his rights of which the plaintiff had had notice.